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No. 80-1710

IN THE

Supreme Court of the United States

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

CONDE J. PEOPLES, III, PHILIP S. GOSS,
and MARY SWEAT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Introductory Statement

Respondents respectfully urge that the issues involved in this litigation do not warrant the grant of the writ in this instance. The decision of the New York Court of Appeals was eminently correct. Moreover, even if a future decision by this Court should determine that the Court of Appeals has ruled erroneously in this instance, the issue is not ripe for determination by the Supreme Court at the present time. Finally, the decision below poses no hardship for the People of the State of New York, inasmuch as New York has a readily available alternative—enactment of acceptable and clearly constitutional legislation—to protect the only areas which the state policy is really concerned about with respect to sodomous activity between consenting adults.

The Procedural Posture

As noted by the petitioner (Petition for Writ, 4), the Court of Appeals considered the appeals of these respondents together with the appeal of Onondaga County District Attorney from the decision of the State's intermediate appellate court declaring the consensual sodomy statute (Penal Law §130.38) unconstitutional. *People vs. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (4th Dep't 1980), *aff'd* 51 N.Y.2d 476 (1980)[1]. A petition for certiorari has been filed by the Onondaga County District Attorney in the *Onofre* case (Docket No. 80-1634). The two petitions should be consolidated and ruled upon jointly. Both cases involve the same issues, *Onofre* presenting the issue in the factual context of privately practiced sex and the remaining cases presenting the issue in the factual context of sex performed in motor vehicles by two couples, one homosexual and the other heterosexual.

ARGUMENT

POINT I.

The respondents had standing to raise the privacy issue.

The New York consensual sodomy law[2] is almost never enforced in situations where the act occurs in a private

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[1] The Court of Appeals decision was consolidated for all cases and is cited herein under its published title, "*People vs. Onofre*".

[2] The consensual sodomy statute is reproduced at Petition, Appendix E (A-52). The definition of "deviate sexual intercourse" is found in New York Penal Law §130.00 and is "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." It thus includes both homosexual and heterosexual acts, performed with increasing frequency in modern times.

place. On a pre-trial hearing held in the *Peoples* and *Goss* case, the chief of the Buffalo Police Vice Squad acknowledged that the police do not attempt to enforce the statute where the acts occur in private (R. 66, 77-78, 109, 113)[3]. This is in contrast to situations, like *Onofre*, where the original charge was that the private sodomous act was forced, not consensual[4]. Thus, the issue never comes to the courts in a pure privacy fact context, apart from the extremely rare case typified by *People vs. Onofre*.

Thus, respondents Peoples, Goss and Sweat occupy the same position as the defendants in *Griswold vs. Connecticut*, 381 U. S. 479 (1965), where the purveyors of the proscribed birth-control devices were allowed to assert the constitutional rights of privacy of the recipients thereof. See, also, *Orr vs. Orr*, 440 U. S. 268 (1979), where the husband was allowed to raise the issue of sex discrimination in the state matrimonial statute, even though the outcome of his case would not have been changed by elimination of the discriminatory provision.

The New York Court of Appeals noted that the issue is moot, anyway, since the disposition in favor of respondents' claim on the basis of impermissible discrimination between married people and single people would be as applicable to the public act as well as to the private act. See *People vs. Onofre, supra*, 51 N.Y.2d 476 at 485, note 2 [Petition, A-14]; *Commonwealth vs. Bonadio*, _____ Pa. _____, 415 A.2d 47 (1980).

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[3] The Legislature, in enacting New York's consensual sodomy statute apparently did not anticipate vigorous enforcement. See Point IV, *infra*.

[4] The original charge against Ronald Onofre was that he forcibly committed sodomy on the complaining witness. An alternative charge of consensual sodomy was included in the indictment. After indictment, the complaining witness recanted, admitting that the act was solely consensual and the matter, having already been indicted, went to judgment. Petition, *New York vs. Onofre*, Docket No. 80-1634, page 5.

POINT II.

The Court of Appeals has correctly determined that the right of privacy extends to private acts of consensual sodomy.

There is nothing in the majority decision in *Griswold vs. Connecticut* to suggest that the right of privacy is limited to the matrimonial state. In fact, the predicate cases used by this Court in inferring the right of privacy involved non-marital situations (education of children, association with organizations, *etc.; Griswold vs. Connecticut, supra*, 381 U. S. at 482-484). *Stanley vs. Georgia*, 394 U. S. 557 (1969), made clear the fact that the privacy right was not so limited. While emphasizing the fact patterns there present (the reading and viewing of printed information), the obscenity of the material there involved deprived it of First Amendment protection. The case is not properly understood as merely a vindication of First Amendment rights. As the Court articulated its reasoning, it becomes clear that a more expansive interest was being protected, the right of occupants of a private dwelling to engage in conduct not objectively harmful to themselves or others without the interference of the State.

> "[A]lso fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusion into one's privacy.
>
> " 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of a man's spirtual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as

> against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.' *Olmstead vs. United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).
>
> "See *Griswold vs. Connecticut, supra* . . . .
>
> ". . . Stanley is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his home. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."

Eisenstadt vs. Baird, 405 U. S. 438 (1972), extended the right of privacy beyond the husband-wife relationship to protect the right of the unmarried person to have access to contraceptives. *Roe vs. Wade,* 410 U. S. 113 (1973), recognized the right of an unmarried pregnant woman to have an abortion. See, also, *Doe vs. Bolton,* 410 U. S. 179 (1973), where Mr. Justice Douglas speaks of the right as protecting "freedom of choice in basic decisions of one's life" (*id.* at 211), *Whalen vs. Roe,* 429 U. S. 589 (1977), where it is described as "the interest in independence in making certain kinds of important decisions" (*id.* at 599-600) and *Carey vs. Population Services,* 431 U. S. 678 (1976), where, in the context of an issue involving the state's right to limit distribution of contraceptives, the Court speaks of it as "a field that by definition concerns the most intimate of human activities and relationships, [where] decisions whether to accomplish or prevent contraception are among the most private and sensitive" *Id.* at 685.

It is with this background of a gradually developing concept of the right to privacy that the New York courts

have recognized private, consensual, non-commercial and non-harmful sodomous activity as being constitutionally protected.

> "Thus, it is seen that the concept of personal freedom includes a broad and unclassified group of values and activities related generally to individual repose, sanctuary and autonomy and the individual's right to develop his personal existence in the manner he or she sees fit. Personal sexual conduct is a fundamental right, protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body. . . . The right is broad enough to include sexual acts between nonmarried persons . . . and intimate consensual homosexual conduct. . . . *People vs. Onofre, supra*, 72 A.D.2d at 270-271 (4th Dep't 1980).

This conclusion by the lower court has been joined in by the New York Court of Appeals in the context of a finding that there is "no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct." *People vs. Onofre, supra*, 51 N.Y.2d at 490. [Petition, A-21].

The conclusions reached by the New York Court of Appeals are consistent with the prior holdings of this Court which have, in effect, recognized the human right to enjoy private erotic pleasures associated with the sexual function, within or without the marital context, without being required to suffer the consequences of pregnancy, on the one hand (*Griswold vs. Connecticut, supra; Eisenstadt vs. Baird, supra; Roe vs. Wade, supra*), or the interference of the State in dictating the moral tastes of the citizen, on the other. (*Stanley vs. Georgia, supra*).

This Court's summary affirmance of the District Court's ruling in *Doe vs. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U. S. 901 (1976), can be readily understood as a rejection of the standing of the plaintiffs who raised the issue of the Virginia statute's constitutionality in a declaratory judgment action. In any event, the summary affirmance is not evidence of this Court's determination on the merits of the issue. *Fusari vs. Steinberg*, 419 U. S. 379, particularly at 391-392, Burger, C.J. concurring (1975).

POINT III.

Whether or not the conclusion below was correct, the matter should not be reviewed by this Court at this time.

Twenty-four States have now decriminalized consensual sodomy between adults in private.[5] Most of this activity toward decriminalization has occurred through legislation. See Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States", 30 Hastings L. J. 799, 950-951 (1979). Where the issue has been presented to state courts for decision on constitutional grounds, only nine States' courts have ruled on the issue.[6] Twenty-seven state jurisdictions

[5] This includes the twenty-two states referred to in Note 5 to the decision below. *People vs Onofre, supra*, 51 N.Y.2d at 491 [Petition, A-22]. In addition, subsequent to the cited article's publication, Pennsylvania invalidated its statute by judicial action (*Commonwealth vs. Bonadio, supra*, decided in 1980), and New York's statute was struck down in the case at bar.

[6] See listing of state decisions in Petition, *New York vs. Onofre*, Docket No. 80-1634, pages 5-6. Pennsylvania, New Jersey, Iowa, Maryland, North Carolina, Oklahoma, Arizona, New Mexico and (with the instant decision) New York have now ruled on the issue. In some instances, however, the state ruling was not by its highest appellate court.

(including the District of Columbia) continue to have consensual sodomy statutes in effect. We can anticipate that, with time, further consideration of the issue will be had among the state courts, and issues which now may not be fully understood or ready for definitive ruling on a national level, with the benefit of the full maturity of extensive consideration by the lower courts, will become ripe for decision by this Court. Whatever the concern of some who would exercise the power to control private morality, if they could, no serious impediment will be placed against any important public policy concerns if this issue is allowed to undergo further review in the state courts and legislatures before a final determination on the issue is made by this Court.

POINT IV.

The public policy concerns of New York State will not be impeded by the denial of certiorari.

The consensual sodomy statute was included in the 1965 recodification of the New York Penal Law simply as a legislative statement of abhorrence of the subject conduct, not with any intention that it be enforced in the private context. The Penal Law Revision Commission had recommended omission of the offense from the new statute. However, the Legislature refused to pass the bill encompassing the entire Penal Law, except in the company of two amending bills reinserting the crimes of consensual sodomy and adultery in the New York Penal Law. See Memorandum of Assemblyman Richard J. Bartlett, Chairman of the Penal Law Revision Commission included in the legislative history. New York State Legislative Annual, 51-52 (1965).[7]

[7] The Memorandum is reproduced at pages 137-138 of the Record to the New York Court of Appeals.

> "The Commission's reasons for omitting this phase of the crime of sodomy [consensual sodomy] were similar to its reasons for omitting adultery. It was of the opinion that this infrequently prosecuted offense involves a manifestation of illness rather than of criminal culpability and should be regarded as an illness rather than as a crime. . . . It would appear that the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premise that deletion thereof might ostensibly be construed as legislative approval of deviate conduct." (*Ibid.* at 52; R-138)

As noted above (Part I of this Brief), the consensual sodomy statute is not enforced in private situations in all but extremely rare instances, like *New York vs. Onofre* (Docket No. 80-1634), which might be expected to occur once or twice in a generation. The real concern of the New York authorities (apart from retaining some moral "standard" in the penal statutes to encourage some privately held concept of morality) is to control *public* conduct. This is already covered by the Penal Law's proscription of public lewdness (New York Penal Law §245.00). If that statute is not sufficiently specific to cover all situations occurring in public, there can be no doubt of the authority of the New York Legislature to pass a statute prohibiting sexual conduct of whatever nature in a place or under circumstances where members of the public may observe the conduct and be offended thereby.

Such legislation would be non-discriminatory (making no exception for husbands and wives) and would apply to all persons and forms of sexual conduct—whether sodomous or otherwise. Thereby, the interest of protecting members of the public from offense would be fully vindicated.

Denial of the present petition, in other words, leaves the State of New York fully free to protect the interests of its citizens from public sex, where offense and harm can be readily inferred. It would merely withhold from New York a statute which, by its terms, is needlessly overbroad and offensive to privacy—covering conduct which the State has no general interest in regulating in any event.

Conclusion

The petition for certiorari should be denied.

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